

LAWRENCE V. SMART TRUST ET AL.

IBLA 93-527

Decided June 6, 1994,

Appeal from a decision of the Oregon State Director, Bureau of Land Management, denying a request to file a late protest of the Final Lower Deschutes River Management Plan, environmental impact statement, and record of decision. OR 46802.

Affirmed.

1. Administrative Procedure: Generally -- Notice: Generally --
Constructive Notice -- Rules of Practice: Protests

BLM properly denied a request to file a late protest of a final river management plan, EIS, and record of decision after notice of the availability of the final plan and EIS for comment was published in the Federal Register and appellants were mailed copies of the plan, EIS, and record of decision.

APPEARANCES: Thomas R. Benke, Esq., Poland, Oregon, for appellants; Donald P. Lawton, Esq., Assistant Regional Solicitor, Pacific Northwest Region, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Lawrence V. Smart Trust and Richard V. Smart, a remainder beneficiary of the Trust (collectively referred to as the Trust), have appealed from a May 20, 1993, decision of the Oregon State Director, Bureau of Land Management (BLM), denying their request to file a late protest of the Final Lower Deschutes River Management Plan, environmental impact statement (EIS), and record of decision approved February 1, 1993. The Trust sought to protest the following language that appeared in the final plan and EIS (and was repeated in the record of decision):

5. Public access on the road downstream from the locked gate may be acquired through resolution of the status of the "Smart Cabin," a house built in trespass on public lands upstream from the locked gate. Short-term leases have been authorized by the BLM for use of the cabin in recent years. One of three options will be employed to resolve the trespass: 1) exchange of the homesite (public lands) for Deschutes Club lands at Devil's Canyon and easements on two road segments near Maupin, 2) relinquishment of the improvements (house, etc.) in

their present condition, or 3) elimination of the buildings and facilities with reclamation of the lands to a natural appearing condition.

(Final Plan and EIS, Vol. I at 72; Record of Decision at 46).

After providing numerous opportunities for public participation, BLM completed the Final Lower Deschutes River Management Plan and EIS in January 1993. See BLM Answer at 3-4. Notice of the availability of the plan and EIS to the public was published in the Federal Register on February 5, 1993, and specified a March 8, 1993, due date for comment. 58 FR 7226-27 (Feb. 5, 1993). BLM also mailed copies of the final plan and EIS by first class mail on January 28, 1993, to persons on a mailing list that included the Trust and Lawrence V. Smart, Jr. See BLM's Answer, Exh. 6, declaration of Brian Cunninghame and attachments. On February 1, 1993, the Prineville District Manager approved the record of decision for the plan, and on February 3, 1993, BLM mailed copies of the record of decision to all persons on the same mailing list. Recipients of the decision were informed they could protest the decision within 30 days from its receipt and thereafter appeal, provided that after the 30-day period ended the decision would be implemented if there were no protests or appeals. *Id.* The post office did not return the copies of either the final plan and EIS or the record of decision addressed to the Trust or Smart as undelivered. *Id.*

On February 4, 1993, in response to the Trust's request for renewal of land-use permit OR 46802 commencing February 1, 1993, BLM provided a draft renewal permit authorizing use of the Smart cabin located on 0.45 acres of public land in lot 1, sec. 13, T. 6S., R. 13 E., Willamette Meridian, Wasco County, Oregon, for a 6-month period beginning February 1, 1993. BLM explained that the short term of the permit was

intended to authorize use during the period allowed for appeal of the final version of the Deschutes River Management Plan. When the Plan is adopted, one of the three options for the cabin will be implemented. These include:

1. Exchange of the homesite (public lands) for Deschutes Club lands at Devils Canyon and easements on two road segments near Maupin.
2. Relinquishment of improvements (house, etc.) in their present condition.
3. Elimination of the buildings and facilities with reclamation of the lands to a natural appearing condition.

The Trust signed the draft permit, and on March 10, 1993, BLM approved it. In doing so, BLM referred to the three planning choices outlined in its February 4, 1993, letter, and stated that BLM expected the Trust to choose one of the three stated options before the end of the permit term.

The Trust appealed this decision by letter dated April 9, 1993, adding in a footnote that it also wished to appeal any terms of the Deschutes River Management Plan that affected the Trust.

By letter dated April 30, 1993, the Trust sought to protest inclusion of the Smart cabin provision in the final river management plan and EIS, indicating that such a protest would fully address the three options listed in the plan. The Trust, while conceding that Richard Smart was well aware of the option of exchanging the Smart cabin property for Deschutes Club property, asserted that neither Richard Smart nor the Trust had actual or constructive knowledge of the inclusion of this alternative in the final plan until after March 10, 1993. The Trust contended that the language concerning the plan appearing in BLM's February 4, 1993, letter was misleading because it failed to make clear the three options listed were part of the plan, inaccurately informed the Trust and Smart that adoption of the plan was prospective (inducing them to believe that there was no adopted plan to appeal when the plan actually had been adopted on February 1, 1993), and erroneously indicated that the period for appeal of the plan once it was adopted would run concurrently with the 6-month term of the permit, although the actual deadline for protesting the plan and preserving the right to appeal was March 10, 1993, the date BLM transmitted the approved land use permit to the Trust. BLM's March 10, 1993, decision, the Trust argued, worsened the notice problem since neither the Trust nor Smart were informed that the plan incorporated the three options. The Trust also challenged inclusion of the Smart cabin provision in land-planning documents, arguing that the procedures followed by BLM in this case violated the Administrative Procedure Act (APA), 5 U.S.C. § 554 (1988).

On May 20, 1993, the State Director denied the request to file a belated protest, observing the BLM's mailing list showed that all planning documents were provided to Lawrence V. Smart, Jr. and the U.S. National Bank, the trustee for the Trust. He found that both the Trust and Smart were informed of the permit terms covering the cabin and the options offered to resolve the trespass, and that temporary authorizations had been issued since the mid-1970's to cover the improvements constructed in trespass on public lands, reciting recent attempts to resolve the trespass and permit issues. The State Director also found that the permit authorizations conveyed neither property rights to the public lands nor use rights persisting beyond the term of the permit, and that BLM had discretion to deny permit renewal even had the river management plan not been completed. He concluded that the Trust had received adequate and timely notice through the record of decision, had been afforded the same notice and opportunity to protest plan decisions as had been given other parties affected by plan decisions, and had been fully informed of the options under consideration to resolve the trespass, which were not materially changed by the plan. Therefore, he denied the Trust's request to file a belated protest.

On appeal the Trust argues that it was denied constitutionally-required due process of law because notice of the final plan's adoption was not reasonably calculated to inform the Trust that its interests would be adversely

affected, and reiterates that allegedly misleading statements were made in the February 4, 1993, letter from BLM. The Trust avers that its records indicate that the Trust never received copies of the plan and record of decision. While acknowledging that Smart was well aware of the exchange option, the Trust contends that he did not know the option had been included in a plan "having the force of law" (Statement of Reasons at 5) and did not have the opportunity to protest the plan decision.

The Trust disputes the State Director's conclusion that the plan did not materially change the three options, asserting that the plan not only takes the options developed through negotiations to resolve an alleged trespass and purports to give them the force of law, but also makes an erroneous factual conclusion that the Smart cabin was built in trespass. The Trust argues that provisions of the plan dealing with the Smart cabin constitute an order rather than a rule under the APA because they are not an agency statement of future effect. It is urged that BLM's failure to comply with notice requirements for adjudications imposed by 5 U.S.C. § 554(b) (1988) requires that the Trust now be given an opportunity to challenge those provisions. The Trust suggests that BLM promulgated the plan as a rule, following rulemaking notice procedures of 5 U.S.C. § 553(b) (1988). The Trust maintains, however, that provisions of the plan dealing with the Smart cabin rest on BLM's determination that the cabin was built in trespass on public lands, a conclusion that the Trust disputes, and that since the Smart cabin provisions are not agency statements of future effect, they cannot be imposed without compliance with the notice provisions for adjudications, 5 U.S.C. § 554(b) (1988).

We reject characterization of the final river management plan and record of decision as either rulemaking or adjudication requiring notice procedures mandated by the APA, 5 U.S.C. §§ 553-554 (1988). The plan and decision were prepared under land-use planning provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (1988), that require the Secretary to allow public involvement in land-use planning. 43 U.S.C. § 1712(f) (1988). The plan is not a legislative rule or regulation concerned with policy concerns for the future. Cf. Delmer McLean, 40 IBLA 34, 37-38 (1979) (challenged withdrawal was not a legislative rule under 5 U.S.C. § 553 (1988)). Nor are the plan and record of decision adjudications under 5 U.S.C. § 554 (1988), which applies only to adjudications required by statute to be determined on the record after opportunity for an agency hearing. See Benton C. Cavin, 93 IBLA 211, 214 (1986), affirmed, Cavin v. United States, 19 Cl. Ct. 198 (1989). The notice requirements of the APA do not apply to this appeal.

[1] Under 43 CFR 4.450-2, an objection to an action proposed to be taken by BLM is a protest. The cited rule contemplates that a person to be affected by a proposed action will in some way be put on notice of that proposed action whether by public notice, such as publication in the Federal Register, by an official BLM record, or by personal notification. See Peter Paul Groth, 99 IBLA 104, 108-10 (1987). In this case, the notice requirement was satisfied when notice of availability of the final plan and EIS was published in the Federal Register.

The Trust also was placed on mailing lists for both the plan and the record of decision. Departmental regulations authorize use of the mails as a means of sending a notice or other communication to anyone entitled to such a communication and provide that a person will be deemed to have received the communication if it was delivered to his last address of record, regardless of whether it was in fact received by him. 43 CFR 1810.2; see Lawrence E. Welsh, 91 IBLA 324, 326, (1986). Although the Trust claims that its records show receipt of neither the final plan and EIS nor the record of decision, no copies of those documents addressed to the Trust were returned by the post office as undelivered. The record, however, contains telephone notes dated May 24, 1993, documenting a telephone call made by Jim Kenna, BLM Area Manager, to Thomas R. Benke, counsel for the Trust, which indicate that Benke did not know if the U.S. National Bank, identified on the mailing list as the recipient of copies of the plan and record of decision addressed to the Trust, would have kept copies of those documents sent to it, and state that Benke agreed "that BLM had 'positive evidence' that a plan was sent to Smart Trust." Under these circumstances, we find that the assertion that the Trust did not find the documents in its records is insufficient to rebut the legal assumption that official acts of public officers discharging their official duties are regular. See Leon F. Scully, 104 IBLA 367, 370 (1988). Moreover, the February 4, 1993, letter from BLM, rather than misleading the Trust, provided another notice to the Trust of the plan and inclusion therein of provisions of possible interest to it.

The Trust has not shown that it has an interest in the cabin site that warrants expanded constitutional due process protection. The land use permit for the Smart cabin conveys no possessory interest, is renewable at the discretion of the authorized officer (43 CFR 2920.1-1(b)), and may be terminated so that the public lands covered by the permit may be disposed of or used for any other purpose. 43 CFR 2920.9-3(a)(6). See Village & City Council of Aleknagik, 77 IBLA 130, 136 (1983). Nor has the Trust demonstrated that the plan and record of decision adversely adjudicate any interest the Trust may have in the cabin site. See Lawrence Smart Trust, 127 IBLA 55, 57 (1993). Any BLM decision that actually determines legal ownership of the cabin site adversely to the Trust will be appealable to this Board, thereby affording the Trust the process that is due it under law. Accordingly, we conclude that the Trust received appropriate, timely notice of the final plan and record of decision and that the State Director did not err when he refused to allow the Trust to file a belated protest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

I agree that the Oregon State Director properly refused to allow the Lawrence V. Smart Trust and Richard V. Smart, a remainder beneficiary of the Trust (collectively referred to as the Trust) to file a late protest of the Lower Deschutes River Management Plan (the Plan) and the environmental impact statement (EIS) and the record of decision. However, I believe that any timely protest filed in this case should have been filed pursuant to 43 CFR 1610.5-2. Under that regulation, protests are to be filed with the Director, BLM, and the Director's decision on the protest is final agency action. 43 CFR 1610.5-2(b). My rationale for that conclusion follows.

The memorandum of understanding entered into by the Bureau of Land Management (BLM), the Bureau of Indian Affairs, various state agencies, counties, the City of Maupin, and the Confederated Tribes of the Warm Springs Reservation of Oregon, which resulted in the Plan and the EIS, stated at page 1:

The planning process is intended to fulfill the State requirements for lower Deschutes River planning by satisfying the requirements of the Deschutes River Scenic Waterway Recreation Area Act (ORS 390.930 - 390.940), and the State Scenic Waterway Act (ORS 390.805 - 390.925) and its rules (OAR Chapter 736, Division 40). The planning process is also designed to fulfill the requirements of Federal laws by complying with the provisions of the National Environmental Policy Act of 1969 (NEPA) and the Omnibus Oregon Wild and Scenic Rivers Act of 1988 (P.L. 100-557), and The Wild and Scenic Rivers Act of 1968 (P.L. 90-542). [Emphasis added.]

In a recent case decided by the Board, New Mexico Wilderness Coalition, 129 IBLA 158 (1994), the New Mexico Wilderness Coalition appealed from a BLM decision dismissing protests of the El Malpais National Conservation Area General Management Plan (GMP). The Coalition protested the GMP arguing that it was, in fact, a resource management plan (RMP) and that by regulation, such a plan is required to be accompanied by an EIS. The GMP, prepared by BLM in response to section 501, P.L. 100-225, 101 Stat. 1543-44, 16 U.S.C. § 460uu-41 (1988), was accompanied by a record of decision and a finding of no significant impact.

On appeal, BLM argued that P.L. 100-225 amended the 1986 Rio Puerco RMP and that the GMP was an activity plan designed to implement P.L. 100-225. The Board concluded that P.L. 100-225 required the preparation of an RMP, and, thus, an EIS should have been prepared. The Board reached this result based on its reasoning that the BLM Manual is binding on BLM and that section 1601.09 of the BLM Manual controlled disposition of the appeal.

Section 1601.09 of the BLM Manual specifically mentions particular statutes and states that "[a] plan prepared by the Bureau to fulfill a land-use plan requirement or a multiple-use management requirement of these or similar statutes is called a resource management plan" (emphasis added). The Board held that section 1601.09 "calls for the agency to prepare a resource management plan when it seeks to fulfill a congressional

requirement for a land-use plan or multiple-use management plan" and that P.L. 100-225 is a "similar statute." 129 IBLA at 162.

Importantly, for this case, one of the statutes specifically cited in section 1601.09 is the Wild and Scenic Rivers Act. The Wild and Scenic Rivers Act requires the Secretary to prepare a plan, after designation, for the development and use of a designated river. 16 U.S.C. § 1274(d) (1988). The river in question was designated as a component of the National Wild and Scenic River System in section 102 of the Omnibus Oregon Wild and Scenic Rivers Act of 1988, P.L. 100-557, 102 Stat. 2782-83 (1988).

Although in its answer in this case BLM states that the Plan is tiered to the Two Rivers RMP "which is a Resource Management Plan issued under the planning regulations found in 43 CFR Part 1600" and that the Plan itself is "an activity plan which provides a more detailed and site specific description of how particular uses provided for in the RMP are to be carried out" (Answer at 2-3), our decision in New Mexico Wilderness Coalition, which is based on the BLM Manual, dictates that the Plan must be considered an RMP.

It appears that BLM also considered that it would be preparing an RMP when in 1990 it provided the public with a notice of intent and availability of the Lower Deschutes River Management Issues and Alternative document. In that notice, BLM stated:

SUMMARY: Pursuant to § 43 CFR 1610.3 and 1610.4-5, the Department of the Interior, Bureau of Land Management, Prineville District Office, in cooperation with nine other managing agencies and the Deschutes River Management Committee, has developed preliminary issues and alternatives to facilitate the development of the Lower Deschutes River Management Plan.

55 FR 4486 (Feb. 8, 1990).

The first regulatory section cited in that notice, 43 CFR 1610.3, relates to coordination with other Federal agencies, state, and local governments, and Indian tribes, and describes the coordination of planning efforts. The second regulatory section, 43 CFR 1610.4-5, is titled "Formulation of alternatives," it is included under 43 CFR 1610.4, which is titled "Resource management planning process." ^{1/}

^{1/} While the development of an activity plan may be considered an extension of the resource management planning process, the Board has long recognized the regulatory review distinction between an RMP and an activity plan or implementation decision. An RMP is "not a final implementation decision on actions," and a decision approving an RMP or amendment of an RMP is subject to review only by the Director, BLM, whose decision is final for the Department. See 43 CFR 1610.0-5(k); 43 CFR 1610.5-2(b). On the other hand, approval of activity plans or decisions which implement a management plan or amendment are appealable to the Board. See 43 CFR 1610.5-3(b); Animal Protection Institute of America, 117 IBLA 208, 218 n.4 (1990); The Wilderness Society, 109 IBLA 175, 178 (1989); Wilderness Society, 90 IBLA 221, 224 (1986).

Accordingly, I believe that we must consider the Plan prepared in this case to be an RMP. Even though the record of decision provided for a protest period and thereafter an appeal to this Board, we have stated many times that the Board of Land Appeals is the sole arbiter of its jurisdiction and employees of BLM may not create the right of appeal where it does not exist nor deny that right where it does exist. Oregon Natural Resources Council, 78 IBLA 124, 127 (1983); Phelps Dodge Corp., 72 IBLA 226, 229 (1983). As an RMP, review of the Plan in this case is governed by 43 CFR 1610.5-2, which provides for protests to be filed with the Director of BLM and that the decision of the Director "shall be the final decision of the Department of the Interior." 43 CFR 1610.5-2(b).

Nevertheless, what we have before us in this case is not an appeal of a decision denying a protest to the Plan over which this Board would have no jurisdiction, but an appeal from the decision of the Oregon State Director denying appellant's request to file a late protest of the Plan.

Under 43 CFR 1610.5-2(a), the protest of the approval of an RMP is required to be filed within 30 days of publication in the Federal Register by the Environmental Protection Agency of notice of receipt of the final EIS. In this case, the Office of Federal Activities published notice of the availability of the Plan and the EIS in the Federal Register on February 5, 1993. Thus, any protest was to be filed within 30 days of February 5, 1993. No provision exists for filing a late protest.

Therefore, I concur in the result in this case because the State Director properly denied the Trust's request to file a late protest.

Bruce R. Harris
Deputy Chief Administrative Judge

